APPEAL NO. 010487

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 31, 2001. The hearing officer resolved the two disputed issues by concluding that the appellant (claimant) did not sustain a compensable injury on _____, and that "the alleged injury arose out of voluntary participation in an off-duty athletic activity not constituting part of the claimant's work-related duties, thereby relieving the carrier [respondent] of liability for compensation."[1]

At the CCH, the hearing officer noted that the carrier was present and ready to proceed and that the claimant was not present, though his ombudsman was. The hearing officer stated that a "ten-day show cause letter" (for this failure to appear) would be sent to the claimant, which would require a response within ten days of the letter's date. The ombudsman stated for the record that the only previous contact he had with the claimant concerned the confirming of the date of the CCH as January 31, 2001. The hearing officer entered into the record the benefit review conference report and, later, his January 31 "ten-day show cause letter." No other evidence was presented and the hearing was adjourned. The hearing officer then signed a decision and order on February 16, 2001, after having closed the record on February 12, 2001, the last day he believed, erroneously, that the claimant's response to the letter would have been timely. In his decision and order, the hearing officer noted that the claimant had not, as of February 16, 2001, responded to the "ten-day show cause letter," nor had he shown, or attempted to show, good cause for his failure to appear at the CCH. The claimant appeals the hearing officer's decision and order because he claims the CCH was rescheduled three times and that the Texas Workers' Compensation Commission's (Commission) "ten-day show cause letter" was not correctly addressed. The carrier responds and urges affirmance.

DECISION

Reversed and remanded.

The record is clear that the claimant did not appear at the January 31, 2001, CCH and thus presented no evidence to meet his burden with respect to whether he sustained a compensable injury. Thus, with no testimony from the claimant or other evidence before him regarding the claimed compensable injury, the hearing officer could have determined that the claimant did not meet his burden of proof. However, the hearing officer's analysis should not have ended at this juncture since the issue of compensable injury is inextricably intertwined with the second issue: whether the claimant's claimed injury arose out of his voluntary participation in an off-duty athletic activity not constituting part of his work-related duties, thereby relieving the carrier of liability for compensation.

[1]We note that there were no findings of fact made by the hearing officer to support this "conclusion of law."

The hearing officer erred in finding that the claimant was not injured in the course and scope of his employment. This issue regarding whether the claimant was injured in the course and scope of his employment or at a voluntary, non-work "recreational activity" could only be resolved with evidence produced by the carrier that the activity during which the claimant was injured was voluntary and not required. The carrier has the burden to bring forth sufficient evidence to raise this affirmative defense. *See* Section 406.032(1)(D) of the 1989 Act.

In Texas Workers' Compensation Commission Appeal No. 931031, decided December 22, 1993, the Appeals Panel wrote:

> When sufficient evidence has been admitted to raise the issue [of an exception to liability under Section 406.032], an exception generally requires the employee to establish it does not apply in showing that the injury arose out of and in the course and scope of employment. March v. Victoria Lloyds Ins. Co., 773 S.W.2d 755 (Tex. App.-Fort Worth 1989, writ denied). We believe the *carrier presented evidence that raises an issue* as to the exception under Section 406.032(1)(B) so that *it was then up to the claimant to prover [sic] otherwise.* [Emphasis added.]

The hearing officer improperly assigned to the claimant the burden of raising this issue and, because the claimant did not appear at the CCH and present any evidence, wrongly concluded that the claimant failed to meet his burden. We again note that the carrier presented no evidence whatsoever.

In his appeal of the decision and order, the claimant argues that his "ten-day show cause letter" was sent to the wrong address and that the CCH was rescheduled three times. He attached to his appeal the envelope addressed by the Commission and mailed to him at the incorrect address. In denoting the claimant's street, the envelope read "[WO]" instead of the correct "[WP]" While the claimant did not specifically address how this mistake harmed him, e.g., he received the letter too late to respond, it can be readily inferred that the claimant's argument is that because of the wrong street name on the envelope, the "ten-day show cause letter" did not reach him in a manner allowing him to timely respond. Certainly, we would not deem the claimant to have received this letter five days after the date mailed in view of the incorrect address. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)).

Though the claimant failed to appear at the hearing and did not show, or attempt to show, good cause for his failure to appear, he has unambiguously raised the issue of whether he received the "ten-day show cause letter" in a timely fashion because of the faulty address at the hand of the Commission. If a claimant does not appear at a CCH, and regardless of whether he or she made a showing of good cause, the Appeals Panel has held that such a claimant may subsequently present his or her evidence at another hearing, because a "single failure to appear" does not warrant a "death penalty" sanction, i.e., the complete dismissal of the claimant's case. Texas Workers' Compensation

Commission Appeal No. 990028, decided February 22, 1999; and Texas Workers' Compensation Commission Appeal No. 970121, decided March 4, 1997. Because the claimant falls squarely into the category governed by the "single failure to appear" criteria, the hearing officer's decision and order is reversed and remanded to allow the claimant an opportunity to present his evidence and to defend against the exception to liability raised by the carrier.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge